Guidance

# ESFA oversight of Independent Training Providers: operational guidance

Updated 29 May 2022

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## 1. Summary

In April 2019 we published our approach to identifying risk of failure by independent training providers (ITPs) and the action we will take to protect learners and to ensure public funds are not wasted. The key measures we introduced were:

- strengthened contract management, with requirements for further information and evidence to be provided to support assurance and risk management, and an enhanced assurance review, improvement, and management arrangements, targeting specific areas of risk
- a new suite of contract provisions in contracts to require specific actions to remedy breaches, including enhanced measures which will be monitored
- use of sanctions, such as suspension of recruitment or restricting growth, to mitigate the potential impact on learners while assurance is being gained or remedial actions undertaken

We will continue to take this strengthened approach and to terminate funding agreements, contracts and our apprenticeship agreements (as referred to hereafter as contracts) early, for the circumstances set out in your contract.

### 1.1 Expiry date

This guidance will be updated to reflect any changes and will be reviewed before December 2022 at the latest.

If you have this guidance in a saved, offline or hard copy format, you are advised to check on GOV.UK to ensure that you are using the most up to date version of the publication.

### 1.2 Who is this publication for?

This publication provides operational guidance for ITPs, which includes a range of different legal entities with which ESFA contracts. In this document we use the terms "ITPs" or "providers" to mean:

- Independent Learning Providers
- Independent Specialist Providers
- Specialist post 16 institutes (note that in this case the term "contract" in this document refers to the grant funding agreement)
- employer providers

For further details please see register of apprenticeship training providers.

### 2.2 Subcontracting reforms

Reforms to subcontracting education for learners over 16 have been put in place to ensure learners receive the best possible education and training and that we have oversight of the use of public funds, ensuring these are spent appropriately, providing value for money.

It is a contractual requirement that accurate and timely sub-contractor declarations are submitted, failure to do so may result in sanctions and potentially, termination of contracts.

## 2.3 Funding high risk organisations

The funding freeze risk assessments and subcontracting policy sets out the circumstances under which ESFA would define a provider to be high risk and sets out the sanction courses of action that may be taken as a result, including termination of contracts.

## 3. Future changes

Please note that the Skills and Post 16 Education Bill introduced on 19th May 2021 which encompasses the reforms set out in the Skills for Jobs White Paper, will further change the ITP sector and the way in which ITPs are contracted with over the next two coming months.

We are currently considering how provider performance will be measured in the delivery of apprenticeships. We will publish our approach before this year.

## 4. Prevention

We expect providers to respond proactively to issues and areas identified for improvement, and to take action to address these before any formal action is taken as provide, identified by us through assurance or compliance reviews, or identified by other external regulators such as Ofsted. Where we think it is necessary, we will seek to take formal action against providers to protect learners and public funds in cases where we are not assured we will take best action to enforce contractual requirements.

## 5. Assurance regime

Our assurance regime encompasses a range of assurance activities, including but not limited to:

- funding rules monitoring
- apprenticeship compliance checks
- a combination of random and risk-based funding assurance reviews;
- ad hoc assurance reviews
- targeted sector thematic funding assurance reviews
- financial health checks (including in-year monitoring)

We have an annual assurance programme, which comprises a number of the activities outlined above. A random and risk-based sample of providers are selected for funding audits or an annual review and audits are carried out throughout the year. Activities we monitor providers satisfying earlier learner and financial data characteristics, target areas of risk and provide assurance on compliance with funding rules and contracts.

Our assurance regime assesses, amongst other things, provider compliance with contractual obligations, verifying data with individual learner records (ILR), to ensure that providers have claimed funding correctly, complying with contract conditions and relevant funding rules. Where funding overclaims are identified and/or ILR data inaccuracies have been branched we will recover funding paid in prior years.

Where significant issues or funding overclaims are identified we may apply appropriate sanctions or penalties commensurate with the seriousness of the breach.

Our assurance and accountability requirements for providers are set out in our post-16 audit code of practice.

In combination with our assurance regime described above, the financial health of the post-16 non-college sector is reviewed and monitored either on a quarterly or annual basis in the case of these organisations we regularly contract with, or on a periodic / ad hoc basis for those we do not. We use the financial health information to inform our delivery plan for monitoring and prospective funding provision and to set subject to sampling.

We conduct assessments to understand the degree of risk to ESFA in contracting with organisations in the sector, either directly or indirectly. We use financial health as a tool to measure organisations' ability to deliver, and to provide assurance on their ability to meet ongoing financial commitments and to the end, indirectly by establishing a maximum recommended value of contracts appropriate to the financial resources of organisations that have a direct contract.

More information on our approach to the assessment of financial health is available on GOV.UK.

## 6. Post-16 monitoring

We receive it data submissions from the Individualised Learner Record (ILR) and other sources, such as the Earnings Adjustment Statement (EAS), Schools Census (SC) and the Student Loans Company (SLC) to:

- identify possible errors in the funding claimed for post-16 delivery that require further investigation
- improve the overall quality of the data reported
- ensure that ESFA funds are paid only for published funding rates
- support the development of policy

Our work currently covers the majority of post-16 funding streams, and ensures we have full assessment coverage of 16 to 19 study programmes, T Levels, traineeships, apprenticeships, loans and the adult education budget. Our contract providers in year in receipt of funding are required to submit their ILR data regularly, and our assurance and ensure data errors are corrected by the end of the ILR 6 data return. We conduct reports we publish externally, we will recover adult and apprenticeship funding for ITPs after ILR deadline any exercises against future delivery where we have not acted in a timely manner.

ESFA expects that providers will proactively consider and review contract variations, for example, by running regular provider data self-assessment toolkit (PDSAT) reports and by reviewing the post-16 monitoring reports delivered.

For further information please see post-16 audit code of practice and View your education data.

## 7. ILR data accuracy and reliability

It is important that we and our stakeholders such as Ofsted can have confidence in the data submitted to us. We expect providers to properly and accurately market, administer, and deliver funding, and to keep accurate records of their performance, as required by contract and funding rules. Changes to the ILR, including learner withdrawals and breaks in learning must be recorded promptly and accurately, so that funding is paid only for what is due, and we can make informed decisions in real time. Changes made to ILR data may have implications for funding recoverable and therefore providers must ensure that their data is correct before close of ILR data collection.

The funding rules monitoring processes set out above provides us with a view on the accuracy of the data submitted by providers, and we will use this information to inform our own data for accuracy. We already publish reports and we expect providers to use to test the credibility of their data, for example the funding information system (FIS), monitoring data and performance reports (PDSAT) and post 16 monitoring reports.

To support providers we have built the Analyse FS Data tool, introduced a live validation service, improved monitoring on collection services and have improved the ILR supporting guidance.

## 8. Investigations

Where information received by ESFA indicates suspected fraud and/or a provider has breached the funding rules an investigation may be launched by ESFA Counter Fraud Unit (CFU) or referred to the ESFA Post 16 Team. The CFU investigation team uses lighting and a rigorous governance process is followed to ensure consistency.

A CFU Investigation Officer is assigned to an investigation and the work may include (but not be limited to):

- following up with activities lower/compliance
- gathering and analysing information
- interviews with provider staff
- feedback and information obtained from affected apprentices/learners
- feedback and information obtained from employers or other interested parties

Where the investigation findings have indicated evidence of fraud or irregularity, ESFA will take steps to recover funds, take contractual action and initiate other appropriate and proportionate enforcement actions as required.

Further details can be found at how ESFA handles allegations of suspected fraud or financial irregularity.

## 9. Risk-based contract management

We take a risk-based approach to managing contracts. We focus our resource on providers where their financial accounts and other relevant data suggest that there is a risk to the delivery of our contracted provision, and we will take action to ensure established a suspected poor provider team to contract management that will the highest value contracts. This means that we will work more closely with those providers to ensure that they are delivering to the required standard and that we minimise significant disruption or disadvantage to learners.

We will use specific triggers in our risk assessment to indicate where there may be areas of concern. Where this will be positive these triggers, contract management will also consider intelligence gathered from day-to-day dialogue with providers and other stakeholders. The areas of concern may be discussed over time however not initial focus is as follows:

- financial concerns (relating to the provider and parent company/wider group structure) including: including financial health information, such as very marginally above the threshold for inadequate, decline in financial health, cash flow issues, late submission of accounts, reliance on ESF funding (coupled with significant change (increase or decrease) in ESF funding)
- adverse information on Ofsted inspection and visits or other data and intelligence
- assurance and compliance concerns, including outcomes of audits and assurance reviews, breaches of funding rules, breaches of contract, complaints and similar listeners and compliance with subcontracting requirements.

Our contracts require providers to deliver value for money and financial probity, and contract managers will raise concerns in relation to a provider's delivery model or operations, where there is a concern about value for money.

## 10. Contract management function

The role of the contract manager is to act on behalf of ESFA to ensure effective use of public funds against the terms of the contract. The contract (and associated specific documentation for each funding stream) sets out the contractual obligations that must be adhered to. The contract and associated documentation also sets out the additional routes to remedy and mitigate risks and issues arising through delivery.

The contract manager will have regular dialogue with the providers to assess performance and compliance. The contract manager role is not one of an assessor or auditor, but they will use information from assurance and compliance reviews, funding rules, contract monitoring and awarding organisation requirements and reports.

The contract manager may request additional information on a range of different areas, including financial, qualitative, compliance and assurance. Such requests are part of day-to-day contract management however, contract managers will have specific responsibilities to request additional information to ensure that we are in a position to assure ourselves.

The purpose of any contract management action is to minimise the risk to learners and employers of potential failure, by challenging the provider where appropriate, seeking additional information or assurance, and utilising specialist teams to support. This may include, but not limited to:

- where required/appropriate, virtual and/or face to face meetings to review contract performance, compliance and assurance, and to discuss the risks to the contract
- consideration of risk mitigation that the provider has put in place or that ESFA can deploy
- requirement to provide additional financial or other appropriate information which may include for example:
  - management accounts and/or a cashflow forecast
  - 6-year qualitative key performance indicators
  - information to support contract performance in terms of learner profile of recruitment, in-learning, retention, progress and achievement
  - information on staffing, including staff turnover
- evidence of staff or self-assessment findings including outcomes from regular PDSATs, feedback from learners, staff and/or employers.

In some cases these may create a number of ESFA teams involved with the provider, but the contract manager will be the main point of contract.

## 11. Contract enforcement action

The contract enables ESFA to request the provider to take/cease action or provide information in several areas. However, additional contractual obligations may be need to require improvement actions not covered by existing clauses and will set out the required improvement to the specified timeline, and appropriate sanctions to support compliance with the required actions. Existing clauses can be applied by letter, and contract variations will be agreed with the provider.

Where provider does not comply with contractual obligations this would be considered a breach of the contract and ESFA would normally have a reasonable opportunity to remedy the breach in line with the contract. If the breach cannot be remedied we would consider termination of the contract.

In addition, the contract specifies circumstances that would be considered a breach of contract and which may result in termination of the contract.

## 12. Sanctions

We may initiate sanctions through the contract where there is a breach and this is necessary to improve performance, protect public funds in the interests of learners and employers. Depending on the nature of the breach, these sanctions include but are not limited to: suspension of recruitment, restricting growth, withholding payments, increases to contract values, or withholding payments. In most cases, we expect to be able to lift sanctions once the associated conditions of funding have been met and/or a breach has been remedied.

## 13. Termination

The contract sets out the full range of circumstance which may result in termination.

Where a provider does not comply with the obligations in their contract this would be considered a breach and the provider would have an opportunity to take remedial action. If the breach cannot be remedied we may consider termination of the contract.

## 14. Change in name and change in ownership

It is a contractual requirement that ESFA must be notified in writing of any change in provider name, ownership, or control. Prior written consent of ESFA must be obtained to revoke any contracts to another organisation. Providers must refer to the clauses within their contracts for notice period required.

Failure to notify could result in termination of provider contracts.

## 15. Market exit and learner protection

Contracts can be terminated by either party (ESFA/provider) for different reasons. Providers may wish to stop delivering ESFA funded provision and request to terminate their contracts. In this instance, they should notify their contract manager in writing, giving at least the notice period set out in their contract.

Alternatively, circumstances may arise that require ESFA to terminate some, or all, of its contracts with a particular provider.

ESFA has established contracts and processes in place to support learners, employers and providers affected when contracts are terminated. We aim to ensure that learners can continue with their apprenticeship or other training programme with as little disruption as possible, whilst ensuring a value for money approach to public funds.

We will provide to employers or Exit Plan setting out how the provider will ensure it meets its contractual obligations to learners and employers. This may include contracts for the government and/or any replacement supplier in the period of termination (including partial termination) or expiry of the contract. The Exit Plan will set out how the provider will ensure it meets its contractual obligations to its contracted deliverers. We expect that those providers that have delivery of learners services will produce a comprehensive Exit Plan and ensure it is regularly updated.

ESFA has created guidance for providers, learners, and employers which remains are terminated. This document should be read in conjunction with provider contracts and funding rules.

## 16. New providers

We recognise that new providers present a potentially higher risk due to lack of familiarity with our requirements. Contract managers will therefore closely monitor performance and compliance. We may also require additional information or attend meetings delivery to consider premises, resources, systems and processes.

## 17. Funding, data & access support

Providers should use ESFA's assurance service for funding and data queries, and issues relating to contracts should be raised with their contract manager, or the provider skills hub, funding (PPFD). The contract manager will refer a provider back to the enquiries service if this is the most appropriate avenue to resolve a query.

The enquiry service support includes:

- data queries including support with ILR completion and error resolution, funding reports and submission of grant funding claims
- system access issues
- funding rules queries including bursary and high needs funding
- Learning Aims Reference Service
- freedom of information requests
- allocations, payments, remittance advice and reconciliation

For queries relating to the apprenticeship service or apprenticeship funding rules providers should contact apprenticeship service support.

Providers are responsible for ensuring any information submitted as part of a query is protected in compliance with the Data Protection Act.